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Supreme Court, U.S.
FILED

JUL 21 2009

OFFICE OF THE CLERK

No. 09-76

In the

Supreme Court of the United States

Jeffrey Nordella, M.D.
Petitioner

v.

WellPoint, Inc. and
Blue Cross of California
Respondents

On Petition For Writ of Certiorari
To The Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Cooper v. Federal Reserve Bank of Richmond* 467 U.S. 867 (1984), the Court held that a judgment in a class action involving claims of discriminatory practices by a business does not preclude individual claims based on particularized misconduct. Whether, under *Cooper*, the settlement of a class action lawsuit concerning allegations of generalized business practices precludes individualized claims of retaliation that could not have been asserted in the class action.

2. Whether a class action settlement notice violates due process when it fails to alert class members that claims asserted in the original complaints in a class action, but that were later amended, were settled and released as part of the class action.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

RULE 29.6 STATEMENT

In compliance with Supreme Court Rule 29.6, petitioner states that he is an individual and thus, there are no corporations or publicly held companies that need to be identified.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jeffrey Nordella, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on April 24, 2009.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is unreported and is reprinted at pages 1a and 2a of the Appendix ("App."). The opinion of the United States District Court for the Southern District of Florida is unreported and is reprinted at pages App. 3a–4a. The Report and Recommendation of the United States Magistrate Judge, which was adopted by both the Eleventh Circuit Court of Appeals and the District Court, is reprinted at pages App. 5a–15a.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on April 24, 2009. (App.1a–2a.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

California Business & Professions Code Section 2156 provides, in pertinent part:

> The application and rendering by any person of a decision to terminate an employment or contractual relationship with, or otherwise penalize, a physician and surgeon principally for advocating for medically appropriate health care consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care violates the public policy of this state. No person shall terminate, retaliate against, or otherwise penalize a physician and surgeon for that advocacy . . .

The entirety of the statute is reprinted at pages 16a through 18a of the Appendix.

STATEMENT

This case presents two issues that are of significant public importance in light of the prevalence of class action litigation in today's society and courts. Resolution of the issues will directly affect both individual litigants as well as businesses that are involved in class action lawsuits.

The Petitioner, Dr. Jeffrey Nordella, was litigating a case in a state court in California involving claims of individualized retaliation by WellPoint and Blue Cross of California, when WellPoint settled a class action lawsuit involving allegations that it and other health insurance companies around the country had engaged in unlawful business practices. (The class action lawsuit is known as the Managed Care Litigation.)

On the eve of trial in Dr. Nordella's California case, WellPoint moved to enjoin Dr. Nordella on the grounds that the claims he was asserting had been released in the Managed Care class action settlement. The U.S. District Court for the Southern District of Florida granted WellPoint's Motion to Enjoin Dr. Nordella by adopting the Report and Recommendations of the District Court's magistrate judge. The U.S. Court of Appeals for the Eleventh Circuit affirmed the District Court's ruling by issuing a per curiam decision that stated it was based on the Report and Recommendation of the magistrate judge.

The Report and Recommendation granted WellPoint's Motion to Enjoin on the basis that Dr. Nordella's California claims were "released claims," even though the magistrate judge specifically acknowledged that Dr. Nordella's California claims appeared to be outside of the scope of released claims:

> Nordella's claim may appear to be outside of the scope of released claims. *The class action litigation did, indeed, center around allegations of industry-wide improper billing practices*, while Nordella claims that he was specifically targeted and punished for advocating good health care for his patients. (See, Appendix, p. 11a, emphasis added.)

Because the court of appeals expressly acknowledged that Dr. Nordella's claims involved individualized retaliation and the class action lawsuit involved generalized business practices (through its adoption of the Report and Recommendation), the court of appeals' ruling is in direct conflict with the principles set forth by this Court in *Cooper v. Federal Reserve Bank of Richmond, supra.*, 467 U.S. 867.

Dr. Nordella's Claims

In June 2003, Dr. Nordella brought suit against WellPoint in Los Angeles Superior Court in California. His suit was based on a California statute that prohibits retaliation against doctors who advocate for better patient care. (California Business & Professions

Code Section 2056.) Specifically, Dr. Nordella's suit claimed that WellPoint had pressured Dr. Nordella to provide substandard care to his patients because it was less costly to WellPoint, and that WellPoint had retaliated against Dr. Nordella when he refused to do comply.

The California lawsuit alleged that, over the course of two years, Dr. Nordella wrote numerous letters to WellPoint's Medical Director, and engaged in multiple telephone calls and even a face-to-face meeting, each time accusing WellPoint of acting solely for the sake of profit rather than in the interests of the patients. WellPoint nevertheless continued to demand that Dr. Nordella change the way he practiced medicine so as to reduce the amount of claims that WellPoint needed to pay. [DE 4824.][1]

When Dr. Nordella refused to comply with WellPoint's demands and instead threatened to sue, WellPoint retaliated by terminating Dr. Nordella's contract as a Participating Physician, defaming him, and interfering with his patient-physician relationships. Specifically, WellPoint sent letters to Dr. Nordella's patients that implied he was professionally incompetent and/or engaged in fraudulent billing practices. WellPoint also told Dr. Nordella's patients that he was "practicing unorthodox

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[1] References to "DE__" are to the Docket Entry numbers in the Managed Care litigation in the U.S. District Court, Case No. MDL No. 1334 Master File No. 00-1334-MD-MORENO.

medicine," that he "was under investigation," and "was the subject of potential litigation stemming from his medical practice." [DE 4824.]

In January 2004, the Los Angeles Superior Court ordered Dr. Nordella's case to arbitration. Thereafter, Dr. Nordella and WellPoint litigated the case in California for over two and a half years. During that time, thousands of documents were exchanged, numerous depositions were taken, extensive discovery was engaged in by both parties, and a trial date was set. Over the course of that entire two and half years, WellPoint never once raised the issue, or even mentioned, that a multi-district class action pending in the U.S. District Court in the Southern District of Florida may be preclusive or related to Dr. Nordella's California claims of retaliation.

Even after the U.S. District Court in Florida issued its Final Order Approving the Settlement of the class action, WellPoint waited months before it sought injunctive relief against Dr. Nordella. During the entire time that WellPoint continued to actively litigate the California case after the Final Order Approving the Settlement had been issued, WellPoint never said one word to Dr. Nordella or his attorneys that it believed the class action settlement was preclusive.

Rather, WellPoint took depositions, including that of Dr. Nordella, produced its own witnesses for depositions, scheduled dates for hearings, communicated daily regarding discovery matters,

drafted motions, and prepared for trial, all without ever even referring to the WellPoint settlement. In fact, WellPoint's attorney instead confirmed – in a letter to Dr. Nordella's attorney – that the California and class action lawsuits were not related: "This is not a class action; only the claims of Dr. Nordella are at issue here." [DE 4869 at pp. 3 and 64.]

Then, just two months before trial was set to commence in Dr. Nordella's California lawsuit, and the next business day following the depositions of key WellPoint employees (depositions that solidified Dr. Nordella's case, and destroyed several of WellPoint's defenses), WellPoint informed Dr. Nordella that it was going to seek to enjoin Dr. Nordella's California case based on the preclusive effect of the class action settlement in Florida.

On February 28, 2006, WellPoint filed its motion to enjoin Dr. Nordella. Thereafter, the motion and Dr. Nordella's opposition were referred to Magistrate Theodore Klein, who issued a Report and Recommendation on May 4, 2006. On May 15, 2006, Dr. Nordella filed objections to the Magistrate's report and requested a hearing (though no hearing was ever held).

Two years later, on April 21, 2008, the District Court adopted the magistrate's Report and Recommendation, permanently enjoining Dr. Nordella from prosecuting his suit in California state court. Dr. Nordella filed a timely appeal to the U.S. Court of Appeals for the Eleventh Circuit.

On April 24, 2009, in a per curiam decision, the court of appeals affirmed the district court's decision by stating:

> Having reviewed the record and briefs of the parties and having heard oral argument by the parties, we AFFIRM the judgment of the district court based upon the well-reasoned Report and Recommendation of the magistrate judge. (App., p. 2a.)

The Class Action Settlement

The class action settlement, as well as the claims asserted in the class action, all involved generalized business practices. Those business practices, of WellPoint and numerous other insurance companies, each related to the reimbursement and processing of claims for payment. The description contained on the web site and the Notice of Settlement discussing the settlement, entitled "*What is this case about?*", stated:

- Misrepresenting and/or failing to disclose the use of edits to unilaterally "bundle," "downcode" and/or reject claims for medically necessary covered services;
- Failing to pay for "medically necessary" services in accordance with member plan documents;

- Failing and/or refusing to recognize CPT modifiers;
- Concealing and/or misrepresenting the use of improper guidelines and criteria to deny, delay, and/or reduce payment for medically necessary covered services;
- Misrepresenting and/or refusing to disclose applicable fee schedules;
- Failing to pay claims for medically necessary covered services within the required statutory and/or contractual time periods;
- Misrepresenting and/or failing to disclose the use of inappropriate or unsound criteria to determine payments due to physicians, physician groups and physician organizations compensated under "capitation" systems;
- Failing to pay "actuarially sound" capitation rates;
- Failing to timely assign members to physicians, physician groups and physician organizations compensated under capitation systems. [DE 4869 at p. 52]

Additionally, the Notice of Settlement in the class action specifically referred to the amended complaints of *Shane I, Shane II,* and *Thomas* as setting forth the claims asserted, and settled, in the

class action. [DE 4321 at p. 209.] Those amended complaints did not includes claims of retaliation.

Each of those amended complaints further demonstrated that the damages sought in the class action were limited to "damages suffered by reason of payments due . . . [that had] been wrongfully withheld, denied, or reduced through Defendants' practices," as well as "[i]njunctive relief to prevent Defendants from employing automated processing techniques that improperly deny or reduce payments, or withholding capitation payments . . . ." [DE 1744 at pp. 70-71.] The complaints provided no mechanism for the recovery of damages other than "withheld, denied, or reduced payments."

Unlike the claims for reimbursement in the class action, Dr. Nordella's California case did not seek any reimbursement for withheld, denied, or reduced claim payments, nor were any of this damages related to claims payments or requests for reimbursement. [DE 4869 at p. 3] Dr. Nordella's case instead sought damages for the destruction and loss of his medical practice, damage to his reputation, and emotional distress, each resulting from claims for retaliation, defamation, and intentional interference with his patients.

Court of Appeals Decision

The court of appeals decision below stated that it was based upon the "Report and Recommendation of the magistrate judge," which was also adopted by the District Court.

The Report and Recommendation states:

> At first blush, Nordella's claim may appear to be outside of the scope of released claims. *The class action litigation did, indeed, center around allegations of industry-wide improper billing practices*, while Nordella claims that he was specifically targeted and punished for advocating good health care for his patients. (Appendix, p. 11a, emphasis added.)

The Report and Recommendation then states:

> [C]laims of retaliatory termination were made against the Defendants in the class action. Specifically, . . . Klay, Breen, and Kelly [three of the named plaintiffs] in the Florida class action all alleged retaliatory termination. (Appendix, p. 12a, bracketed material added.)

However, the Klay, Breen, and Kelly complaints were original complaints filed by three individual plaintiffs that were later superseded by the amended

complaints (*Shane I*, *Shane II*, and *Thomas*). It was *Shane I*, *Shane II*, and *Thomas* that were the complaints specifically referred to in the class action settlement notice as setting forth the claims at issue in the class action. [DE 4321 at p. 209.]

The Report and Recommendation, which was adopted as the basis for the court of appeals ruling, then concluded that "the broad language of the Settlement includes Nordella's claims and provided Nordella and other class members with sufficient notice so as to avoid any due process violations."

REASONS FOR GRANTING THE PETITION

The Petition should be granted because the court of appeals ruling below conflicts with general principles governing class actions set forth by this Court as well as the standards established by several federal courts of appeals, and presents important questions that should be settled by this Court.

I. The Settlement of a Class Action Lawsuit Concerning Allegations of Generalized Business Practices Should Not Preclude Individualized Claims of Retaliation That Could Not Have Been Asserted in the Class Action.

A. The Decision Below Conflicts with Precedent of this Court.

The Report and Recommendation adopted by the Eleventh Circuit Court of Appeals states that:

> Nordella's claim may appear to be outside of the scope of released claims. *The class action litigation did, indeed, center around allegations of industry-wide improper billing practices*, while Nordella claims that he was specifically targeted and punished for advocating good health care for his patients. (App., p. 11a, emphasis added.)

There is a very good reason that the court acknowledged that Dr. Nordella's claims may be outside the scope of the released claims: under the rules governing class actions, the WellPoint class action could not have encompassed his individual claims because they did not involve generalized conduct applicable to the rest of the class, and because his damages were completely different than those of other class members.

Despite that significant acknowledgment, the court of appeals ruled (through its adoption of the Report and Recommendation): "Given the broad language of the Settlement Agreement, this Court finds beyond dispute that Nordella's claims are released claims." [DE 5832-1.]

That is exactly contrary to the holding in *Cooper v. Federal Reserve Bank of Richmond, supra.*, 467 U.S. 867 (1984). In *Cooper*, a class action was filed, seeking to establish that an employer had engaged in a pattern of racial discrimination. Several members of the class testified in the class action. After the class action was resolved in favor of the employer, those individuals then filed a separate action against the employer. The employer moved to dismiss on the ground that the judgment in the class action was res judicata.

Reversing the court of appeals, the Supreme Court held that the class action was not res judicata because the individual claims were not affected by the class action judgment:

> The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision making.' [Citations omitted.]

The parallel is obvious: just as the individualized claim of discrimination was grossly distinguishable from the "generalized pattern" class action in *Cooper*, Dr. Nordella's individualized

California statutory claims of retaliation were vastly different from the class action that centered on "*industry-wide improper billing practices*," in the Magistrate's own words.

The Report and Recommendation adopted by the court below, further characterizes Dr. Nordella's claim as one that "could have been raised" in the class action; in essence, the Report and Recommendation means that Dr. Nordella should have intervened in the class action to assert his individualized claim.

That is also contrary to the holding in *Cooper, supra.*, where the employer that was cleared of allegations of racial discrimination, moved to dismiss later filed individual claims of discrimination, and argued that to permit the plaintiffs "to bring separate actions would frustrate the purposes of Rule 23." The Supreme Court disagreed:

> The class-action device was intended to establish a procedure for the adjudication of common questions of law or fact. If the [employer's] theory were adopted, it would be tantamount to *requiring that every member of the class be permitted to intervene* to litigate the merits of his individual claim. [Bracketed material and emphasis added.]

The Supreme Court explained why intervention to assert individualized claims cannot be permitted in

the context of a class action:

> Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions. Its purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant.

Accordingly, applying the principles set forth in *Cooper*, a class action lawsuit concerning allegations of generalized business practices only focuses upon, and resolves, common questions of law and fact applicable to all class members. Where a class member has an individualized claim, such as retaliation, the settlement, or adjudication, of the class action should not preclude the individualized claim, nor require the individual to intervene and litigate the merits of that claim.

B. The Decision Below is Contrary to Several Courts of Appeals' Decisions.

WellPoint argued below, just as other class defendants commonly do, that "a release in a class action settlement can be very broad." But, as is well recognized by several courts of appeals, there must be limits on that breadth, such that a class action settlement only releases claims based on an identical factual predicate, and claims for which the class members could have sought compensation in the class action.

In *TBK Partners, Ltd. vs. Western Union Corp.*, 675 F.2d 454 (2d Cir. 1982), the Second Circuit ruled:

> [W]e see no reason why the judgments upon settlement cannot bar a claim that would *have to be based on the identical factual predicate* as that underlying the claims in the settled class action . . . . '[A] settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the *very same set of facts*.' [Citations omitted and emphasis added.]

The Fifth Circuit has held that a release may bar "those claims alleged in the complaint and before the court, [and] also claims which could have been alleged by reason of or in connection with any matter or fact set forth or referred to in the complaint." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) (internal quotation omitted). The Third Circuit in *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 326 (3d Cir. 1998) likewise recognized that "releases may include all claims, including unpleaded claims that arise out of the same conduct alleged in the case."

Now, even more than twenty years after the Second Circuit's decision in *TBK Partners, supra.*, courts have continued to follow that law. The court in

Consolidated Edison, Inc. v. Northeast Utilities, 332 F.Supp.2d 639, 651-652 (S.D.N.Y. 2004), held that:

> [C]ourts must take 'special care' when a class action settlement purports to release claims 'not asserted within [the] class action or not shared alike by all class members.' . . . . An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of members, whether few or many, which were not within the description of claims assertable by the class.
>
> [A] court should 'decline[ ] to permit *the uncompensated release of claims resting on a separate factual predicate* from that settled in the class action.' [Citations omitted and emphasis added.]

Here, too, the factual predicate underlying Dr. Nordella's claim of individualized retaliation is completely separate from the factual predicate underlying the class action settlement of generalized business practices involving claims payments and reimbursement.

Additionally, the class action settlement resulted in only nominal monetary consideration in the form of reimbursement for unpaid claims to members of the class action [DE 4321 at p. 76], whereas the damages sought by Dr. Nordella in his California

lawsuit were for 1) the loss of his entire medical practice [DE 4824 at p. 44 (¶ 65)], 2) the injury to his reputation resulting from the slander and defamation [DE 4824 at p. 47 (¶¶ 76-77)], and 3) the interference with his physician-patient relationships. [DE 4824 at p. 51 (¶ 97).]

Since Dr. Nordella did not seek any recovery for reimbursement of claims payments (the basis for the damage claims in the class action [DE 4869 at p. 3]), his retaliation claims could not have been encompassed in the class action. Moreover, if the court of appeals' decision below is allowed to stand, Dr. Nordella will ***never*** be compensated for the damages he suffered as the result of WellPoint's retaliation, nor will he ever have his day in court – a violation of his right to due process.

II. A Class Action Settlement Notice Violates Due Process When It Fails to Alert Class Members that Claims Asserted in the Original Complaints in the Class Action, But That Were Later Amended, Were Settled and Released as Part of the Class Action.

Dr. Nordella's right to due process was violated when the court of appeals adopted the erroneous Report and Recommendation, which stated that:

> [C]laims of retaliatory termination were made against the Defendants in the class action. Specifically, . . . Klay, Breen, and Kelly [three of the named plaintiffs] in

> the Florida class action all alleged retaliatory termination. (App., p. 12a.)

The error in that statement lies in the fact that the claims of those three plaintiffs were never incorporated into the Amended Complaints known as *Shane I*, *Shane II* and *Thomas* – which were the actions settled in the class action. As a result, the allegations contained in the other three complaints were nullified. *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219-1220 (2007), *cert. den. sub nom. Hanna Steel Corp. v. Lowery*, 128 S.Ct. 2877 (2008).

In *Lowery*, a group of plaintiffs in a putative class action filed an initial complaint that would have justified removal. The defendant sought removal, but the Eleventh Circuit Court of Appeals held that the plaintiffs' amended complaint (which did not support removal) had completely superseded the allegations of the initial complaint:

> [I]t would be improper to bind plaintiffs by the prayer for relief in the initial pleading. Plaintiffs have since amended the prayer for relief, and this amended prayer for relief supersedes the one contained in the initial complaint . . . . *[A]n amended complaint supersedes the initial complaint* and becomes the operative pleading in the case. [Citations omitted and emphasis added.]

It is well established in federal law that following an amendment, "the earlier complaint is a dead letter . . . ." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008).

In *Lowery*, the class action plaintiffs filed the first complaint and then were not bound by those allegations when they themselves filed another. *A fortiori*, in this case it makes no sense to say that Dr. Nordella, who was not connected in any way to the superseded Klay/Breen/Kelly complaints, was affected by them following the filing of the amended *Shane/Thomas* complaints. Once the amended complaints had been filed, no one would have had any reason to look at the superseded pleadings. The settlement documents make no reference to the superseded complaints and refer only to the *Shane/Thomas* complaints. [DE 4321 at pp.16 - 17.]

Moreover, even if the superseded complaints had contained claims roughly similar to Dr. Nordella's, and the complaints had not been superseded, that still would have been irrelevant, since the scope of the settlement is controlled by the settlement notices provided to the class members. The law is well established that courts must look specifically to the settlement agreement, and its accompanying documentation, to control the scope of the settlement, regardless of what some individual class members may have included in their complaints. *Twigg v. Sears Roebuck & Co.*, 153 F.3d 1222, 1226-1228 (11th Cir. 1998). In Dr. Nordella's case, the court of appeals ignored that very law.

In the documentation accompanying WellPoint's class action settlement, there was no indication to Dr. Nordella (or anyone else) that the settlement was designed to preclude claims based on individual retaliation against a physician who advocated for his patients; there was no mention of retaliation claims at all. [DE 4869 at pp. 52, 54-60.] Thus, the Report and Recommendation (adopted by the court below) was in error as a matter of law, since it focused on the irrelevant and superseded allegations of a few of the class action plaintiffs that were grossly distinguishable from Dr. Nordella's claims.

Since the settlement notice in the WellPoint class action made no mention of individualized retaliation claims, and failed to alert the class members that such claims were encompassed within the settlement, the notice constituted a violation of due process. See, *Twigg, supra,* 153 F.3d at 1128-1129 (11th Cir. 1998):

> Viewed as a whole, the notices do not adequately inform an absent class member . . . either that claims like his were being litigated or that they had been settled. We need not decide whether the district court correctly determined that [the individual plaintiff] was a person who purchased 'automotive repair services' or that his claims arose from the same operative nucleus of fact as the [earlier] Class Action. Even if the elements of claim preclusion are present,

> deficiencies in the notices preclude our allowing the judgment in the prior action to bar [his] claims because invocation of the bar would not be consistent with due process. [Bracketed material added.]

What makes the error below even more egregious is that in *Twigg*, where the court held a settlement notice must stand on its own, regardless of what some individual class members may have included in their earlier complaints, the supposedly-similar allegations were contained in a still-viable complaint. In the present case, the "supposedly similar allegations" of retaliation were contained in a superseded complaint that had been replaced long ago by the amended complaints, doubly-hidden from absentee class members. *A fortiori*, if the pleadings in *Twigg* could not rescue a defective notice, they cannot do so in this case.

See also, *W. Alton Jones Foundation v. Chevron U.S.A., Inc.*, 97 F.3d 29, 37 (2d Cir. 1996):

> Where documents giving notice of settlement of a class action are prepared in such a way as to mislead a potential class member into believing that it is not a class member, and therefore has no need to opt out of the class in order to preserve an independent lawsuit, *the recipient will not be required to scour all other potentially pertinent documents* in an effort to discover whether the

> reassuring documents sent to it were inaccurate. [Emphasis added.]

What the court's ruling below means, in essence, is that a class action settlement notice comports with due process if the notice states that the class action complaints alleged that the class action defendants engaged in several types of wrongful conduct, *including but not limited to* the types of allegedly improper conduct specifically described in the Notice.

If that were true, however, then every class action settlement notice, no matter how vague and uninformative, would pass muster. But that is exactly contrary to the holding in *Twigg v. Sears Roebuck & Co.*, *supra*, 153 F.3d at 1227: "Surely the best notice practicable under the circumstances cannot stop with . . . generalities."

Thus, where the notice of a class action settlement fails to alert class members to the fact that claims in previously filed complaints, that were later amended, were being settled and released, the notice violates due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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July 20, 2009

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12814

D.C. Docket No. 00-01334-MD-FAM

M.D. Leonard J. Klay, et.al.

Plaintiffs, et.al.

JEFFREY NORDELLA, M.D.,

Plaintiff-Appellant,

versus

ALL DEFENDANTS, et al.

Defendants,

BLUE CROSS AND BLUE SHIELD OF CALIFORNIA, WELLPOINT HEALTH NETWORKS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before, BIRCH, DUBINA, and WILSON, Circuit Judges.

PER CURIAM.

Having reviewed the record and briefs of the parties and having heard oral argument by the parties, we AFFIRM the judgment of the district court based upon the well-reasoned Report and Recommendation of the magistrate judge, issued on 4 May 2006 and adopted by the district court on 21 August 2008.

AFFIRMED.

Case: 1:00-md-01334-FAM Document 5840 Entered on FLSD Docket 04/21/2008

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Master File No. 00-1334-MD-MORENO

IN RE MANAGED CARE LITIGATION

THIS DOCUMENT RELATES TO:
ALL PROVIDER TRACK CASES

---/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND GRANTING INJUNCTION AGAINST DR. JEFFREY NORDELLA

THIS CAUSE came before this Court upon the Re-Filing of the Motion to Enforce Final Order Approving Settlement Against Dr. Jeffrey Nordella or For an Order to Show Cause Why Dr. Nordella Should Not be Held in Contempt (D.E. No. 5832), filed on March 13, 2008. The Matter was referred to Magistrate Theodore Klein. The Magistrate filed a Report and Recommendation. The Report and Recommendation is filed at docket entry 5832–1. The Court has reviewed the entire file and record. The

Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Theodore Klein's Report and Recommendations (D.E. No. 5832-1) is AFFIRMED and ADOPTED. Accordingly, it is ADJUDGED that:

(1) Dr. Nordella is a Class Member that has initiated litigation concerning Released Claims against a Released Person in violation of the WellPoint Settlement and this Court's Order Approving the Settlement.
(2) The Motion to Enforce Final Order Approving Settlement Against Jeffrey Nordella is GRANTED. Dr. Nordella has twenty (20) days from the date of this Order to discontinue the California proceedings against Blue Cross.
(3) The Motion for an Order to Show Cause Why Dr. Nordella Should Not Be Held in Contempt is DENIED with leave to re-file if Dr. Nordella does not discontinue the California lawsuit within twenty (20) days.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of April, 2008.

s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MDL No. 1334
Master File No. 00-1334-MD-MORENO
Magistrate Judge Theodore Klein

IN RE: MANAGED CARE LITIGATION

THIS DOCUMENT RELATES TO
PROVIDER TRACK CASES

REPORT AND RECOMMENDATION TO GRANT IN PART DEFENDANT WELLPOINT'S MOTION TO ENFORCE FINAL ORDER APPROVING SETTLEMENT AGAINST DR. JEFFREY NORDELLA OR FOR AN ORDER TO SHOW CAUSE WHY DR. NORDELLA SHOULD NOT BE HELD IN CONTEMPT[1]

This matter came before the Court on Defendant WellPoint's Motion to Enforce Final Order Approving

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[1]Pursuant to 28 U.S.C. §636(b)(1)(A) and the Magistrate Judge Rules of the Southern District of Florida Local Rules, these motions were referred to the undersigned Magistrate Judge for report and recommendation.

Settlement against Dr. Jeffrey Nordella or for an Order to Show Cause Why Dr. Nordella Should Not Be Held In Contempt (D.E. No. 4832-1 and 4832-2), filed February 27, 2006. This Court having reviewed the motion, response, and reply, recommends that Defendant's Motion be GRANTED in part.

BACKGROUND

As a result of a complex, multi-district, class-action litigation initiated by scores of physicians against various health insurance companies, settlements were reached between numerous physicians and several of the insurers. Among these is the Settlement Agreement Among WellPoint, Inc., and Physicians, Physicians Groups and Physician Organizations, Certifying Class and Directing Entry of Final Judgment (D.E. Nos. 4671 and 4684).[2] In its approval order, the Court permanently enjoined Class Members from, among other things:

> filing, commencing, prosecuting, intervening in, participating in (as class members or otherwise) or receiving any benefits from any lawsuit, administrative, or regulatory proceeding or order in any jurisdiction based on any

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[2] On December 22, 2005, the Court entered an order approving the settlement (D.E. No. 4671), and subsequently entered an amended order on December 31, 2005 (D.E. No. 4684).

> or all Released Claims against one or more Released Persons.

Amended Order Approving Settlement, p. 7.

In June of 2003, well before settlement, Dr. Jeffrey Nordella had initiated suit against Defendant Blue Cross of California.[3] Following the settlement agreement, counsel for Blue Cross sent a cease and desist letter to Nordella, demanding that he withdraw his claims against Blue Cross; however, Nordella has continued to pursue his lawsuit. WellPoint now moves this Court to enforce the settlement agreement, and order Nordella to cease to prosecute the California action.

ANALYSIS

The language of the Court's approval order is clear; class members are expressly prohibited from initiating lawsuits against released persons for any claims released by the Settlement. This Court, therefore, must grant WellPoint's motion if three conditions exist: 1) Nordella is a class member; 2) Blue Cross of California is a released party under the Settlement; and 3) the claims at issue in Nordella's lawsuit are released claims.

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[3] This Court notes that Blue Cross of California is a wholly owned subsidiary of WellPoint and that Blue Cross entities are specifically named as released parties in the Order Approving Settlement.

A. Nordella is a Class Member

The Order approving the settlement among Health Net and physicians certified the class as follows:

> Any and all Physicians, Physician Groups and Physicians Organizations who provided Covered Services to any Plan Member or any other individual enrolled in or covered by a plan offered or administered by any Person named as a defendant in the Complaint or by any of their respective current or former Subsidiaries or Affiliates, in each case from August 4, 1990 through the Preliminary Approval date.

(D.E. 4684, p.4). The Preliminary Approval was entered on July 11, 2005. (D.E. 4318). Nordella provided covered services to Plan Members between August 4, 1990 and July 11, 2005; Nordella is therefore a class member. It is undisputed that Nordella did not opt out of the class. In the Order Approving Settlement, the court held that

> All other members of the Class [excepting those who timely opted out] (as permanently certified below), shall be subject to all of the provisions of the Settlement, the Agreement, this Order and the Final Judgment to be entered by the Clerk of the Court.

(D.E. No. 4684, p.3). Nordella, therefore, is bound by the terms of the Settlement.

B. Blue Cross of California is a Released Person

The Order Approving Settlement describes "Released Parties" as including "Company and each of its present and former parents, present and former wholly-owned Subsidiaries." (D.E. No. 4684, p. 5). The Order also provides that "[t]he Releasing Parties [Class Members] further agreed to forever abandon and discharge any and all Claims that exist now or that might arise in the future against BCBSA and/or any Blue Cross and Blue Shield licenses or wholly owned subsidiary of such licensee. . ." (D.E. No. 4684, p. 6). There is no question that Blue Cross of California is a Released Party for purposes of the Settlement and the Court's Injunction.

C. The Claims Asserted by Nordella are Released Claims

The Order Approving Settlement describes Released Claims broadly. Released Persons are permanently discharged from

> any and all causes of action, judgment, liens. . . and demands of whatever kind of character . . . arising on or before the Effective Date what are, were, or could have been asserted against any of the Released Parties by reason of, arising out of, or in any way related to any of the

> facts, events, transactions, occurrences, courses or conduct, representations, omissions, circumstances or other matters referenced in the Actions, whether any such Claim was or could have been asserted by an Releasing Party on its own behalf or on behalf of other Persons, or to the business practices that are subject to §7 of the Settlement Agreement. This includes, without limitation and as to Released Parties only, any aspect of any Fee for Service Claim submitted by any Class Members to Company and to any claims of any Class Member. . .

(D.E. No. 4684, p.5–6). Released claims are further described as

> any and all Claims that exist now or that might arise in the future against BCBSA and/or any Blue Cross and/or Blue Shield licensee or wholly-owned subsidiary of such licenses, which Claims arise from, or are based on, conduct by any of the Released Parties that occurred on or before the Effective Date and are, or could have been alleged in the Complaint. . .

(D.E. No. 4684, p.6). Given the broad language of the Settlement Agreement, this Court finds it beyond dispute that Nordella's claims are released claims.

D. Nordella's Position

1. Claims Outside the Scope of the Settlement

Nordella takes the position that his claims are not released claims on the grounds that the main thrust of the class action litigation involved the insurer's computerized billing practices, while Nordella's claim is primarily based upon retaliatory termination in violation of California law. Nordella argues that Blue Cross pressured him to provide substandard care to this patients in order to reduce costs to Blue Cross, and that when he refused, he was terminated as a Blue Cross provider.

At first blush, Nordella's claim may appear to be outside of the scope of released claims. The class action litigation did, indeed, center around allegations of industry-wide improper billing practices, while Nordella claims that he was specifically targeted and punished for advocating good health care for his patients. Nordella contends that "Blue Cross now argues that just because the WellPoint Florida case involved computerized 'downcoding' issues, it now has a 'get out of jail free' card to engage in all sorts of intentional tortious conduct, as long as one facet of its wrongful behavior can also be described as 'downcoding.'" (D.E. No. 4866, p. 4). However, the situation is not as simple as Nordella would like to make it. As WellPoint correctly points out, all of Nordella's claims are "related to" claims raised in the class action, and in fact, claims of retaliatory

termination were made against the Defendants in the class action. Specifically, plaintiffs Klay, Breen, and Kelly in the Florida class action all alleged retaliatory termination. (D.E. No. 963 at ¶96, D. E. No. 1064 at 139-41).

Nordella argues that had theWellPoint parties in the class action wanted to include retaliatory termination claims within the settlement, they would have expressly done so.[4] This argument is unavailing. As noted above, the description of released claims is extremely broad, and this broadly inclusive language is clearly deliberate, and typical of class actions released. See, e.g., Wal-Mart Stores, Inc. v Visa U.S.A., Inc., 396 F.3d 96, 106 (2nd Cir. 2005). The parties agreed to release all claims "in any way related to" the class action, which had been or even "could have been" brought. Nordella's claims are undeniably related to claims that were, or could have been raised in the class action. Because he did not opt out of the class, he is

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[4] Nordella's makes the additional argument that the notices sent out in connection with the class action did not specifically state that retaliatory termination claims would be included within released claims. This failure, argues Nordella, results in a due process violation. This due process argument is essentially the same argument raised here with a different title. As to both of these arguments, this Court finds that the broad language of the Settlement includes Nordella's claims and provided Nordella and other class members with sufficient notice so as to avoid any due process violations.

bound by the terms of the Settlement and is prohibited from pursuing these claims against Blue Cross.

2. The Anti-Injunction Act

Nordella argues that the federal Anti-Injunction Act prevents this Court from enjoining the California state action:

> [a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. §2283. The language of the Act makes clear that a federal court may grant an injunction to stay proceedings in a state court if such proceedings are in contravention of a judgment of that court.

As discussed above, the court entered a Final Judgment approving the Settlement, and expressly enjoining any class member from pursuing released claims against released persons. The scenario at hand could not fall more squarely within the provisions of the Anti-Injunction Act which allow this court to enjoin the California action. This Court is expressly given the power to enjoin suits such as Nordella's under precisely the circumstances present here.

3. WellPoint's Delay in Seeking Injunctive Relief

Nordella claims that WellPoint waited over two and one half years into the California litigation before seeking injunctive relief against Nordella, and that this delay estops WellPoint from doing so now. While it is true that the California litigation had been ongoing for two and one half years when WellPoint sought injunctive relief, WellPoint's right to seek such relief had only recently been established.

The Settlement between WellPoint and plaintiffs in the Florida class action was approved in December 2005 and Amended in January 2006. WellPoint notified Nordella that he must cease and desist with the California lawsuit on February 16, 2006, and upon Nordella's refusal to refrain, filed the instant motion on February 27, 2006. There simply is no delay at issue here. WellPoint is therefore in no fashion estopped from moving for injunctive relief at this time.

CONCLUSION

Nordella is a Class Member that has intitiated litigation concerning Released Claims against a Released Person in violation of the Settlement and the Court's Order. Accordingly, it is

RECOMMENDED that WellPoint's Motion to Enforce Final Order Approving Settlement Against Jeffrey Nordella (D.E. No. 4823–1) be GRANTED, and

that WellPoint's Motion for an Order to Show Cause Why Dr. Nordella Should Not Be Held In Contempt (D.E. No. 4823–2) be DENIED. Nordella shall have twenty (20) days from the date of the District Court's adoption of this Report and Recommendation to discontinue the California proceedings against Blue Cross, failing which the contempt motion shall be revisited by the Court.

DONE and SUBMITEED in Chambers at Miami, Florida this 4th day of May, 2006.

s/ Theodore Klein
THEODORE KLEIN
UNITED STATES MAGISTRATE JUDGE

Copies to:
District Judge Federico Moreno
All counsel of record

The parties shall have ten days after being served with a copy of this Report and Recommendation to file written objections, if any, for consideration by the District Judge. Failure to file objections timely shall bar the parties from attacking any factual findings contained herein.

CALIFORNIA BUSINESS & PROFESSIONS CODE SECTION 2156

§ 2056. Retaliation against physicians who advocate for medically appropriate health care for patients; prohibition; scope of protection

(a) The purpose of this section is to provide protection against retaliation for physicians who advocate for medically appropriate health care for their patients pursuant to Wickline v. State of California 192 Cal.App.3d 1630.

(b) It is the public policy of the State of California that a physician and surgeon be encouraged to advocate for medically appropriate health care for his or her patients. For purposes of this section, "to advocate for medically appropriate health care" means to appeal a payor's decision to deny payment for a service pursuant to the reasonable grievance or appeal procedure established by a medical group, independent practice association, preferred provider organization, foundation, hospital medical staff and governing body, or payer, or to protest a decision, policy, or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients.

(c) The application and rendering by any person of a decision to terminate an employment or other

contractual relationship with, or otherwise penalize, a physician and surgeon principally for advocating for medically appropriate health care consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care violates the public policy of this state. No person shall terminate, retaliate against, or otherwise penalize a physician and surgeon for that advocacy, nor shall any person prohibit, restrict, or in any way discourage a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care.

(d) This section shall not be construed to prohibit a payer from making a determination not to pay for a particular medical treatment or service, or to prohibit a medical group, independent practice association, preferred provider organization, foundation, hospital medical staff, hospital governing body acting pursuant to Section 809.05, or payer from enforcing reasonable peer review or utilization review protocols or determining whether a physician has complied with those protocols.

(e) Medically appropriate health care in a hospital licensed pursuant to Section 1250 of the Health and Safety Code shall be defined by the hospital medical staff and approved by the governing body, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care.

(f) Nothing in this section shall be construed to prohibit the governing body of a hospital from taking disciplinary actions against a physician and surgeon as authorized by Sections 809.05, 809.4, and 809.5.

(g) Nothing in this section shall be construed to prohibit the Medical Board of California from taking disciplinary actions against a physician and surgeon under Article 12 (commencing with Section 2220).

(h) For purposes of this section, "person" has the same meaning as set forth in Section 2032.